
U.S. Department of Labor
Office of Administrative Law Judges
525 Vine Street, Suite 900
Cincinnati, Ohio 45202

Date Issued: FEB 8 1989
Case Nos. 88-ERA-28 and 88-ERA-30

In the Matter of

FLOYD M. SIMMONS
and
LARRY D. SIMMONS
Complainants

versus

FLUOR CONSTRUCTORS, INC.
Respondent

RECOMMENDED DECISION AND ORDER

Complainants, who were employees of Fluor Constructors, Inc., (hereinafter referred to as Fluor), were laid off on March 30, 1988. They subsequently filed Complaints alleging violations of the employee protection provisions of the Energy Reorganization Act, 42 U.S.C. §5851(a) (1982). The Area Director of the Wage and Hour Division, U.S. Department of Labor, investigated the allegations in the complaints and concluded that the allegations of the Complainants were unprovable in that:

> You were laid off, not for refusing to work in an unsafe area, but because the firm had no work for you and several other electricians.

Complainants filed a timely appeal from that determination. They seek immediate and unconditional reinstatement to their former positions, full back pay through a reinstatement date plus fringe benefits, compensatory damages plus costs, including reasonable attorney fees.

These cases were consolidated for hearing with the case of another individual who had also filed a complaint against Fluor, but whose appeal basis was entirely different than that of the Complainants here. Some of the evidence received into this record concerning the company operation and factual circumstances relating to the other Complainant is pertinent only to the other case. This Recommended Decision relates only to the disposition of issues concerning the complaints filed by Floyd M. Simmons and Larry D. Simmons.

The FINDINGS OF FACT AND CONCLUSIONS OF LAW which follow are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon my analysis of the entire record,[1] arguments of the parties, and applicable regulations, statutes, and case law. I find the testimony of all of the witness to be credible.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Crystal River Power Plant (hereinafter referred to as Power Plant) located in Crystal River, Florida, is owned by the Florida Power Corporation (hereinafter referred to as Florida Power). The Power Plant is situated upon approximately forty-seven hundred acres and has four fossil fuel units or coal burners and one nuclear unit. Florida Power employs approximately eight hundred individuals in the operation of the Power Plant. Fluor Constructors, Inc. (hereinafter referred to as Fluor), has a supplemental maintenance contract with Florida Power to provide additional maintenance forces at times when Florida Power is either unable to hire individuals quickly enough or under circumstances where modifications to the plant are required. All activities of Fluor conducted at the Crystal River site are controlled by Florida Power procedures and Florida Power policy pursuant to the terms of the Fluor Maintenance Contract. Fluor provides maintenance services only in the nuclear plant which is identified as Crystal River Unit 3 (hereinafter referred

---

to as CR-3). Fluor's initial contract with Florida Power for maintenance work went into effect in April of 1984 and was for a term of two years. The contract was worth approximately forty-two million dollars. A second contract was subsequently received by Fluor for an additional two-year period. The second contract carried a value of twenty-one million dollars. Fluor now operates under a third contract from Florida Power for maintenance services which carries a contract value of approximately six to seven million dollars.

Pursuant to the terms of the contract, Florida Power initially submits work assignments to Fluor for cost estimates. The resulting estimate of Fluor relates to the number of man hours required to complete the job and also the dollar value. Florida Power then approves the work assignment in the form of a Work Authorization (hereinafter referred to as WA), and it is only upon receipt of that authorization that Fluor commences its activity.

The size of the Fluor work force is determined by the volume of work contained in the WA's. Fluor can do no work whatsoever until a WA is received.

Safety responsibility at CR-3 is shared between Fluor and Florida Power. Fluor has responsibility for the industrial safety of all of its employees. Industrial safety includes the providing of safety glasses, hard hats, proper scaffolding, safety belts, and other measures similar to these. These items would have had to have been provided by Fluor regardless of whether their employees were working around a nuclear facility. Florida Power has responsibility for all of the radiological safety pertaining to the nuclear operation. Radiological safety pertains to all work in the radiation controlled areas that may require a radiation survey and a radiation work permit request (hereinafter referred to as RWPR). The contract between Fluor and Florida Power specifies these responsibilities.

Fluor does not have its own Health Physics Technicians (hereinafter referred to as HP). The Fluor RWPR is directed to the Florida Power Health Physics Unit, who in turn, visit the work area to determine the safety precautions which must be taken by the workers. Once HP personnel have completed the reconnaissance of the work area, they write a radiation work permit (hereinafter referred to as RWP) and define all of the requirements concerning dress-out, respiratory protection, and any other protective measures. The RWP is then issued to Fluor

---

and is good for thirty days. The RWP's are subject to change while the job is continuing. The Chemistry and Radiation Department or Chem-Rad Department at Florida Power is responsible for the radiological safety of CR-3.

The CR-3 nuclear unit is subject to two different types of outages. The unit is on an eighteen-month refueling cycle so that every eighteen months there is a normal refueling outage at which time the reactor is either completely or partially defueled and new fuel is added. Modifications and necessary maintenance are also performed during this outage. The nuclear unit is also subject to forced outages which are caused by breakdowns in a component or due to malfunctions of some type. A forced outage is necessitated by repairs performed to correct these problems. Immediately following the repair work, the unit is then brought back on-line. These outages can vary in length.

Larry D. Simmons and Floyd M. Simmons began working at the Crystal River Nuclear Power Plant site in August of 1971. They both commenced their employment on the same day. The nuclear plant was under construction at that time and they were involved in the construction process from the time of their hiring until sometime in 1978 when the construction was basically completed, and they then became maintenance workers.

The Simmonses were hired at the Power Plant as pipefitters with a specialty in welding. Pipefitters install and maintain pipe and anything that runs through a pipe, whether it be

liquid or air, gas, or solids. A pipefitter was required to fabricate, assemble, and weld pipe, together with being involved in the construction of hangers, supports, or structures associated with the piping work. They also did work other than welding in that they maintained, repaired, installed, and removed snubbers which were retraints used in the piping construction. There also was a lot of hanger work which required them to drill holes in plate steel in order to anchor the hangers which held the pipe. The record describes a variety of jobs which were performed by the Simmonses in their classification as pipefitters. It is in the area of welding, however, that this record shows the Simmons brothers to have performed outstanding work.

Larry Simmons testified in detail how each welding job has a set of welding procedures written by a Florida Power engineer. He described how the welding work required a review of those

---

procedures, and how each particular weld had to be made while complying with the specific procedures. Every weld was categorized by Florida Power, and a welding procedure was prescribed by their engineer. Florida Power also has a welding manual which prescribes the procedures to be followed in performing the various welds. In the event there was any deviation from the prescribed welding procedure in the manual, a Florida Power engineer had to authorize that change. Between 1971 and 1978, the Simmonses worked for several different construction companies at the Crystal River site. When the construction finally was completed sometime in 1978, there were only a few individuals remaining from the actual construction work crews, and those were the workers that were retained to comprise the maintenance crew. The Simmonses were a part of that group. Two companies had the maintenance contract for CR-3 prior to the entry of Fluor Constructors in 1984. The Simmonses worked for both of those companies and then became employees of Fluor.

The Simmonses first became pipefitters in 1969, and performed construction work in a variety of places prior to the time that they commenced employment on CR-3. They had previous experience in working at other Nuclear Power plant sites. Fluor acknowledges that the Simmons brothers were excellent welders. There apparently were no other welders on the Fluor payroll in March of 1988 who had the same welding experience. Larry Simmons had served as a foreman at one time, but not while employed by Fluor. They had received letters of appreciation (CX 1), and they also had been used to train other employees.

Larry Simmons testified that the workload at Fluor was somewhat cyclical. In other words, at times there was a lot of work, and at other times, there was substantially less. He noted, however, that in the past when the workload became low, the core eight or ten employees would be called into the supervisor's office and they would ask if anyone wanted any time off without pay, or vacation without pay in lieu of being laid off. Then when work picked up again, these individuals would still have a job. He testified that

when he and his brother were laid off in March of 1988, they were not given an opportunity to take time off but were immediately terminated. Neither of the Simmons brothers had ever been laid off in their seventeen years on the job. Larry Simmons also testified that at least one other individual was given the opportunity to work the full day on the date that he was laid off. That courtesy was not extended to Complainants.

[Page 6]

The record also documents the filing of other safety complaints by the Simmonses. In 1984, a complaint was filed with the Occupational Safety & Health Administration, (OSHA), concerning the positioning of an air bottle in a hatchway leading into the reactor containment building. Floyd Simmons filed that complaint. Larry Simmons was not aware of any corrective action that resulted from that filing. The record does contain a letter from OSHA detailing a proposed purchase of an oxygen administrator and oxygen cylinders which were to be located in the airlock hatch accessway. (CX 24) The record also details complaints filed by Floyd Simmons with the Nuclear Regulatory Commission. The record would also seem to document some prior laxness on the part of Fluor in correcting other safety problems. (CX 6) These safety-related activities, however, dated back to 1984. The record also documents the great care taken by the employees in their manner of dress while working in order to prevent exposure to any contaminated materials. Complainants were also trained in the use of respirators. Fluor conducted weekly safety sessions.

On February 5, 1988, a RWPR was lodged in which authorization was requested to fabricate and install jacking bolt pads on each corner of motor bases which were located in the A and B decay heat pits. (CX 19) The work permit request noted that there were thirty-two jacking bolt pads, and that the job would require grinding and welding. It was estimated the job would take two-hundred and thirty total man hours, and that the planned starting date was February 8, 1988. The decay heat pit is a room located in the radioactive control area of the plant below the bottom floor. The room contains pumps with heat exchangers that remove some of the heat from the piping in the building.

A RWP was subsequently issued identifying the clothing to be worn, respiratory needs, dosimetry, disclosing continuous HP coverage, and also noting ALARA review.[2] The work permit noted that respiratory protection was required because the welding or grinding was to be done on contaminated material. A copy of the RWP is posted at the work site. The work was commenced on February 8, 1988, and I received into evidence a videotape which showed a recreation of the type of work being performed by the Complainants. The tape demonstrates considerable air turbulence

---

[Page 7]

in performing the grinding associated with the job. The record shows that alterations were made to the original RWP by parties unknown. (CX 2; RX S) The original RWP did require that respirators be used.

The Complainants worked continuously on the decay heat pit project until March 16, 1988, on which date they had a problem with respiratory use. On the morning of March 16, they were refused respirators by the HP unit at Florida Power. Following the refusal, the Complainants carried the matter to their general foreman who pursued it with Florida Power Personnel. At a subsequent meeting, the Simmonses were advised that they would do the work without respirators or other individuals would be brought in to perform the jobs. At that time, the Complainants represented to their general foreman that the matter would be taken to the NRC. The problem was later discussed with a Fluor supervisor and he was advised that the Simmonses would carry the matter to the NRC. They were than taken to the Office of the Project Superintendent, Mr. James Patterson, who indicated that he would discuss the matter with the NRC officials on the job. The problem was later resolved as the result of Florida Power allowing the Simmonses to execute a deviation form to the RWP and respirators were assigned for use "for industrial purposes." (RX 20) The Simmonses were aware of contamination because of an incident that took place in 1978 when they encountered contamination in the plant. That incident made them more aware of the use of respirators.

Following the issuance of the respirators to continue the decay pit work, decay pit B was completed. Some materials had been prepared for use in decay pit A. However, the Simmonses were not assigned to work in that pit. They were subsequently placed in the yard cutting-up scrap metal. No explanation was provided to them as to why they were not assigned to complete the work in pit A.

On March 28, 1988, a safety meeting was held. Some management personnel and other workers attended. Martin C. Brown, the mechanical supervisor, also was in attendance which was unusual since he did not ordinarily attend the safety meetings. He inquired of the Complainants as to where they stood on the respirator issue. The Simmonses advised him that they were not going to do something that they knew was not right. Larry Simmons testified that Mr. Brown, at that point, indicated

---

that Florida Power does not tell them how to weld and they should not tell Florida Power HP personnel how to do their job. At that point, Mr. Brown then indicated to them that they would either do as Florida Power requested or that they would be "laid off." Two days later, on Wednesday, March 30, 1988, they were laid off. (RX Q) Mr. Bobby Thompson, the general foreman, brought the pink slips to the Simmonses and advised them that they just did not have any more work. They were advised to be gone from the premises within four hours. Following the taking of their final dosimetry reading, they returned to an office wherein their final checks were waiting for them. They were paid and they left.

The Simmonses also had previously encountered a problem with regard to their body dose of radiation levels. A record is kept by Florida Power based upon the dosimetry readings of the individual employees. The dosimeter is a chip which is worn by the employee which records the amount of radiation exposure received by that individual. The chip is read periodically, and the data recorded is maintained on a computer by Florida Power as prescribed by the NRC. The employees receive a computer printout of the dosimetry readings about once a month. Larry Simmons testified as to how his dosimetry readings were altered at one point to show less exposure. The reading on the computer printout is a cumulative lifetime figure, and that number was lowered. Approximately thirty employees were involved with the dosimetry reading question.

Floyd Mitchell Simmons[3] also testified. He did not disagree with any portion of his brother's testimony. Mitchell Simmons' job record, experience and qualifications as a welder are basically the same as his brother Larry. He testified that his welding knowledge and experience were better than the other welders who were retained. He also had served as a union steward for Catalytic, Inc., when it was performing the maintenance work and also was a pipefitter foreman for Catalytic. He also worked as a weld test foreman for Fluor.

Mitchell Simmons also testified concerning a problem that he experienced relating to a piece of retrofit testing equipment which was being installed at the plant sometime in July of 1987. This equipment was safety-related. Four individuals, including a Fluor supervisor, had visited the job site to determine the man-hours required to perform the work. Five days were

---

requested. Following the commencement of the work, Mitchell Simmons and the other workers were advised to complete the work in approximately half of the time. As a result of that directive, he advised a Florida Power manager in the presence of the Fluor services site manager that the request was an impossibility. To perform the job in that short a period of time would have created a safety hazard. Following a discussion of the matter with the Fluor supervisor who had directed that the time be cut, Mr. Simmons finished the job in the originally alotted four days. Following that incident, Mitchell Simmons testified that the Fluor manager did not speak to him.

Mitchell Simmons also testified concerning a problem which he experienced with washing welds in the sea water room. Mr. Simmons refused that activity and his testimony was that the process was ultimately concluded in the proper way. However, in October of 1987, after explaining the problem to Mr. M. C. Brown, who is Fluor's mechanical supervisor, Mitchell Simmons testified that Mr. Brown never spoke to him again.

Mitchell Simmons also testified concerning the problem regarding the dosimetry report from Florida Power which carried the amount of their exposure dosage. The report given

to him during the July or August safety meetings contained computer readings which showed that his dosage had been rolled back approximately nine-hundred and ten. He pursued the matter with his superiors, but after getting no satisfaction, he threatened once again to go to the NRC. Mr. J. R. Thompson urged him not to take that action and finally, on January 26, 1988, he was given a written explanation concerning the 1986-1987 lifetime whole body dose. (CX 10) The memorandum indicated that the error involved the double entry of a "jump pac" dose. The lifetime dosage figures were corrected as shown in the memorandum. The correspondence was generated by a health physics supervisor. The record shows that other errors had been made by the HP unit in determining lifetime doses with respect to other workers, and that the Complainants here had discussed this matter with the project superintendent for Fluor. On the morning of their layoff, they were advised that the health physics supervisor had refigured their total lifetime dosage, and a copy of the reconfiguration was given to them at that time. Mr. Simmons also produced some Florida Power computer printouts of accumulated dosages which he had received and other employees had received over a period of time. (CX 13) These reports had been provided

---

to the employees by the general foreman at a Fluor regular safety meeting. The computer printouts carried readings which were different from the final computations made by Ron Browning of the health physics section. Mr. Simmons prepared a summary of the numerous individuals whose lifetime dosages had been rolled back based upon the computer printout readings. The computations of Mr. Simmons show that his lifetime rollback was a significant change. Mitchell Simmons testified that he first requested records of his lifetime body dosage on August 12, 1987, and that as of the time that he was terminated by Fluor that he had not been provided that information.

Mitchell Simmons also testified concerning the results of a complaint that he had filed with the Nuclear Regulatory Commission concerning safety violations. (CX 22) This complaint was filed approximately five years prior to the time, however, when Fluor commenced performing the maintenance work for the plant. Mr. Simmons also testified concerning a complaint which he filed with OSHA sometime during the year 1984. That complaint related to the air bottle in the containment vessel. Mr. Simmons also filed a complaint with the Nuclear Regulatory Commission concerning the actions which had led up to his termination in March of 1988. Thus, the record discloses a history of complaint filings.

Mitchell Simmons also testified concerning a fire watch problem which he experienced while working in the decay pit. Both Florida Power and Fluor had policies relating to fire protection during welding or grinding procedures. The Simmonses had received their fire card from Florida Power which permitted them to perform the cleaning, welding, and grinding work in the decay heat pit. They had requested fire protection on that job because they felt unsafe while working with respirators, and in an area that was surrounded by herculite. Their visibility was apparently not good. They had requested a

fire watch, who is a person assigned the responsibility of watching for fires and has a fire extinguisher handy. He asked his general foreman in March for a fire watch, but was denied that request by the general foreman even though Mitchell Simmons had been contaminated while performing the decay pit work. As late as March 16, 1988, Mitchell Simmons testified that he made statements to Fluor management personnel concerning the filing of a complaint with NRC concerning the respirator use. His testimony in that regard would verify the earlier testimony of Larry Simmons. The

---

Complainants explained their story concerning the respirator use to Jim Patterson, who expressed a desire to determine the NRC policy in that regard. However, Mitchell Simmons testified that Mr. Patterson never responded to their request. He did indicate that at a safety meeting held on March 28, 1988, that M. C. Brown advised both of the Complainants that they would have to conform with the HP wishes of the Florida Power personnel people or they would be laid off.

Mitchell Simmons also verified his brother's testimony concerning the way in which their discharge on March 30, 1988 was different from the usual procedures that had been followed by Fluor in the past for layoffs. Those differences are noted above.

Of the eight remaining pipefitters who were available on March 30, 1988, at the date of the Simmons' layoff, only half of the pipefitters were also welders. The Simmonses retained the higher certifications in terms of welding experience. However, both Jerry Salter and Richard Denmark held welding certifications. The record is clear, however, that the Simmons brothers held the largest total number of welding certifications which permitted them to do different types of welding.

George S. Renshaw, who is the Project Site Manager for Fluor at Crystal River, also testified. He was originally hired by Fluor in December of 1984, and has been the site manager since July of 1986. As the site manager, he has the final responsibility for all hiring, terminations, planning, scheduling, estimating, administration, payroll, engineering, and all financial responsibilities. He is the highest Fluor employee located at Crystal River. Before he became site manager, he was the manager of engineering and control. In that position, he managed the field engineering organization of the company which prepared all work packages, and he also was in charge of the Controls Department, which had full responsibility for all facets of the work packages and work requests that were received by Fluor. In that capacity, he also had responsibility for the industrial safety of the field engineers.

Mr. Renshaw testified concerning a very distinguished career in the nuclear power field. He began his career in 1958 as a nuclear field seaman recruit, went on to prototype training, and received a reactor operator's license. He was also qualified as

---

[Page 12]

an engineering lab technician who was responsible for the primary and secondary chemistry of a submarine nuclear power plant. He served sixteen years in the U.S. Navy and twelve additional years in the U.S. Navy Reserve in which he was directly involved with nuclear submarines. He has other nuclear-related training and experience. After being discharged from the Navy, he worked for a ship builder for five years where he was directly involved with the overhauling and refueling of nuclear submarines. Following that experience, he was employed by the Tennessee Valley Authority where he spent five years working in fossil fuel units. He served in a supervisory capacity where he had responsiblity for hiring and terminations.

Mr. Renshaw testified that the size of Fluor's workforce is determined by the work authorizations which have been approved by Florida Power. The scheduling of work is initiated by Florida Power when they make a request that work be performed all as described earlier in this opinion. The work authorizations come through the superintendent of construction for Florida Power whose name is Clinton Dutcher.

Mr. Renshaw has full responsibility for the hiring, terminating, or laying off of all Fluor employees. His testimony was that when there are large numbers of workers to be laid off, that he requests assistance from the superintendents as to which workers should be laid off. When the numbers are low, he is the one who makes the final decision as to who should be laid off and who should be retained. The first people to be let go during the concluding period of an outage are the "travelers." Travelers are individuals who work outside of the jurisdiction of their own local union, and who travel from outage to outage between nuclear facilities. The travelers will work at a facility until the outage work has been completed and the layoffs begin. At that point, they will move to another nuclear facility for employment. The policy of laying off the travelers first is dictated by a potential grievance problem from the local employees and the local unions. Following the termination of the travelers, Fluor's policy is to terminate the individuals in the local union, and after they are gone, the core unit of employees is then reduced if that becomes necessary.

When Fluor first obtained the maintenance contract from Florida Power, there were approximately seventy craftsmen on board. That number had been reduced to twenty-six during the

---

[Page 13]

month of July 1988. The total number of employees, including staff, had been reduced to approximately forty at that time. Mr. Renshaw testified that in the process of reducing the employee number so significantly, he must look at the overall qualifications of the individual. After the travelers are let go in a layoff and those members of the local unions, only the core group of employees will remain. In determining which of the core employees are to be laid off, Mr. Renshaw testified that lie must look to the leadership

ability of the employees to determine who should be retained. Leadership is important because when they start to rehire people in the future, it will be necessary to have individuals in place who can take charge of the new employees. He also testified that he must weigh the overall general skills of the employees in addition to anticipating future work demands. They attempt to keep the best qualified individuals for the work that they will be required to do. The same principles would be applied in determining which members of craft and which members of his staff were to be laid off.

Respondents produced a computer printout which traced the history of Fluor's manpower since the award of the first contract in April of 1984. (RX A) The exhibit separates the craft employees manpower from the staff. The craft personnel were identified by Mr. Renshaw as being the manual workers, including the pipefitters, electricians, sheet metal iron workers, sprinkler fitters, and all the normal trade crafts. The staff personnel consist of the planners, estimators, schedulers, cost control people, administrative people, the engineers, clerical type personnel, and also the superintendents. The printout clearly shows that manning-up of Fluor employees occurred during the outages and that the manpower was substantially reduced upon the conclusion of the outage. Most recently, during the refuel VI outage, the total number of Fluor employees at its highest level was four-hundred and eight-six, consisting of four-hundred and ten craft employees, and seventy-six staff employees. Those numbers were attained during the week of September 22, 1987. Since that time, the total number of employees had dropped almost on a weekly basis to the point that the last recorded week was July 26, 1988, when there were only a total of forty-six Fluor employees, of which twenty-six were craft and twenty were staff.

The printout shows that manning-up and laying-off of employees was not unusual in that a similar process was followed during other outages. On March 29, 1988, Fluor had employed

---

forty craft people and twenty-one staff people, for a total of sixty-one employees. Between March 29, 1988, and April 5, 1988, eight additional craft individuals were apparently terminated. The following week, four additional craft workers were let go, and the following week, two more. Statistically a pattern of craft reductions was clearly in place at that time.

Mr. Renshaw testified that the refuel VI outage was originally to have been completed on Thanksgiving day 1987, but it was extended through January 9, 1988, at which time, the unit was brought back on line. Refuel VI was approximately six weeks longer than had been planned, and apparently cost Florida Power substantially more dollars than had been budgeted. Mr. Renshaw testified that at this time, Florida Power experienced a change in philosophy in that he was advised that there were things that they intended to do for themselves in the future which had been contracted out as a part of the maintenance contract to Fluor in the past. This change in philosophy meant that Fluor

would not be receiving as much work as they had in the past. The change was important since Fluor was about to enter into a new contract with Florida Power starting in March of 1988.

Mr. Renshaw testified that the Simmons brothers were laid off because Fluor Constructors simply ran out of work. He explained that upon the expiration of one contract, all standing work authorizations had to be reapproved by Florida Power. Upon the advent of the new contract on March 30, 1988, Florida Power had not approved the old work authorizations apparently in part because of the change in philosophy which had taken place in January of 1988. As a result, there was less work for the Fluor employees in the crafts. Mr. Renshaw testified as to how he had been apprised by Clinton Dutcher, who is the Construction Superintendent for Florida Power, that the change in philosophy would cause a decrease in Fluor's workload. That conversation had taken place in January of 1988. The pipefitter manpower for Refuel VI peaked at one-hundred fourteen on September 29, 1987, and gradually decreased to seven pipefitters as of January 12, 1988. (RX B) The seven remaining pipefitters as of that date were all part of the core personnel of Fluor. After the Simmons brothers were laid off on March 30, only three pipefitters remained. Included in the group of seven as of January 12, 1988 were Bobby Thompson, who was the general foreman; Richard Denmark, who was the night shift general foreman; Jerry Salter, who was a pipefitter and a pipefitter-welder; and the Simmons

---

brothers, who were both pipefitter-welders. In addition, there were two other individuals by the names of Don Helm and Billy Weigelt, who were mechanics. The mechanics had no welding qualifications, but were primarily mechanics. All seven of these individuals were carried as pipefitters. The mechanic or fitter was a worker who does a lot of the fit-up work and a lot of the mechanical-type pipefitting while he is welding. They are primarily mechanical people and not welders. All seven of these individuals were core employees and had been there since 1984 when Fluor first obtained the contract for maintenance.

Mr. Renshaw testified that following his conversation with Mr. Dutcher concerning the Florida Power change in philosophy in January of 1988, that he met with Jim Patterson, who was the Fluor Project Superintendent for the purpose of discussing future manpower needs. Renshaw testified that Patterson had recommended in early January that they keep two welders, two fitters, and the general foreman if they had to go beneath seven pipefitters. That recommendation meant that they would have to let two welders go. Those welders would have been the Simmons brothers. Renshaw disagreed with that assessment and determined that the Simmonses should be kept because of the work that was coming up which would be primarily welding activity. (Tr. 509) He was considering the work that would be required in the decay heat pits. As a result of that decision, Don Helm and Billy Weigelt were laid off since they had no qualifications as welders, but they were strictly fitters. Mr. Renshaw testified that in the same conversation with Mr. Patterson that it was determined that the next two people to go would be the Simmons

brothers. (Tr. 510) Renshaw indicated that in laying off the Simmonses that those individuals retained were good all around pipefitters, but they also had leadership abilities which would be necessary during the next man-up. At this time, Renshaw advised Martin C. Brown, who was Fluor's mechanical supervisor, that the Simmonses would be laid off next. (Tr. 512) That conversation with Mr. Brown took place sometime in the first part of February 1988. Also toward the end of February or the first part of March, Florida Power determined that they would stop the decay heat pump work. However, finally that work was allowed to continue to the conclusion of the work in pit B. Florida Power subsequently refused to allow any work to be started in pit A. The Fluor management summary manpower projections for March of 1988 demonstrated a significant reduction in the number of man hours required for the pipefitter work. (RX E; Tr. 521) Following the completion of the decay

---

heat pit work in pit B on or around March 23, 1988, the Complainants had been working in the field cutting up scrap while management awaited the rollover of work authorizations into the new contract. (Tr. 522)

Mr. Renshaw testified as to the leadership ability of those pipefitters who were not laid off on March 30, l988. He testified that although Larry Simmons was a very good welder, the work that remained and that was coming up was not for pipe welding. The same was true also for Mitchell Simmons. (Tr. 532) Renshaw directed that the Simmonses be off-site within four hours on the morning of March 30, 1988, since Clinton Dutcher had told him on March 29, 1988 that they would only pay for four hours of work on that day. (Tr. 533, 534) Both the operating engineer and painter who were laid off on the same day were also required to be off-site in four hours. The record shows that even some of those pipefitters who had beer retained were scheduled off of work in April, June, and July because there simply was no pipefitting work to be done. (RX L)

Renshaw also addressed various of the contentions being made by the Complainants here concerning the company's discriminatory conduct. Concerning the hiring of two pipefitters the Friday before this case was heard, he testified that the majority of this work was mechanical in nature and only about forty percent related to welding activity. His testimony was that there were welders on site who could perform the welding job. This new work was strictly short-term, and was to have been completed within four to six weeks. At that time, he anticipated the two individuals would be once again laid off. Renshaw testified that if additional welders had been needed, that he would not hesitate to hire the Simmonses immediately.

His testimony was that although he is now aware of some of the prior complaints filed by the Simmonses, that the complaint filing did not come into play in his decision to lay them off on March 30. Concerning the dosimetry records, he testified that there had been a computer foul-up back in 1986 which caused the generation of erroneous numbers for some of the pipefitters. He was not aware of the names of any of the individuals involved.

The responsibility for keeping dosimetry records is that of Florida Power, and Fluor had no responsbility in that area. Mr. Renshaw was not aware of a problem with the dosimetry reading with respect to the Simmonses until after they had already been laid off.

[Page 17]

Renshaw testified that Mr. Patterson had advised him on March 16, 1988 that the Simmonses might go to the NRC over the respirator issue associated with the work being done in the decay heat pits. Renshaw testified that radiological safety is the responsibility of Florida Power, and that he does not make the decision as to who gets the use of a respirator. He testified that on March 17, 1988, that he was satisfied that the Simmons' complaint on the use of the respirator was unfounded. The record is clear that on March 16, 1988, that he did become aware that the Simmonses had threatened to carry the issue to the NRC. Mr. Renshaw was aware that the Simmonses were using air-fed respirators on March 17, 1988, and it was his belief that the problem had ended there. Apparently as a result of the Simmons' complaint with respect to respirator use, Mr. Renshaw arranged for the Chemistry and Radiation Department of Florida Power to explain the company policy at a Fluor weekly safety meeting. He acknowledged that some of the Florida Power training personnel were advising Fluor employees that if they wanted a respirator, all they had to do was ask for one. This, in fact, was not the case. Only the HP technicians can determine if respirator use is required.

Renshaw also testified that the controversy concerning the bottle in the air lock chamber had taken place before he arrived at Fluor, and that he was not aware of the problem until after the Simmonses had been laid off. The same is true with respect to the crane incident and the fire watch problem. He also testified that the quality control covering the washing of welds in the sea water room would have been under the control of Florida Power. Finally, Renshaw testified that he did not become aware of any complaint having been filed with a governmental agency by the Simmonses until he received the Department of Labor's original complaint in this case. That complaint was apparently received in mid-April of 1988 which was after the Simmonses had been laid off. Additionally, he testified that it was not Fluor's policy since he had been project site manager to allow the core employees to take time off in lieu of being laid off.

CONCLUSIONS OF LAW

This action arises under the Energy Reorganization Act of 1974, § 210(a), as amended, 42 U.S.C.A. § 5851 (hereinafter referred to as ERA), which provides, in pertinent part, as follows:

[Page 18]

(a) Discrimination against employees

> No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) --
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.], or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
> (2) testified or is about to testify in any such proceeding or;
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.].

This case arises in the Eleventh Judicial Circuit which has yet to determine the allocation of proof burdens in an Energy Reorganization Act whistleblower case. This matter requires violations under the Act. In these cases, the evidence provides two possible motives for the termination of the Complainant, one being a legitimate management reason, and the other being an impermissible motive of retaliation for a protected activity. The applicable burden of proof standards adopted by the Secretary in "dual motive" cases are those expressed by the National Labor Relations Board in *Wright Line, a Division of Wright Line, Inc.*, 1980 CCH NLRB #17,356 (1980), affirmed *sub. nom. NLRB v. Wright Line*, 662 F.2d 889 (1st Cir. 1981), *cert. denied* 455 U.S. 983 (1982), and approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 103 S.Ct. 2469 (1983). The standards set forth in *Wright Line* have been made applicable to proceedings arising under § 5851 of the ERA. *Consolidated Edison Company of New York, Inc. v. Donovan*, 673 F.2d 61 (2d Cir. 1982).

A variety of other Circuits have also applied these same standards in disposing of dual motive cases.

In applying *Wright Line* to this case, it was incumbent upon the Complainants to initially establish a *prima facie* case discrimination against Fluor Constructors by way of proof of the following:

> 1. That the party charged with discrimination is an employer subject to the Act(s);
> 2. That the complainant was an employee under the Acts);
> 3. That the complaining employee was discharged or otherwise discriminated against with respect to his or her compensation, terms, conditions, or privilege employment;

4. That the employee engaged in "protected activity;"
5. That the employer knew or had knowledge that the employee engaged in protected activity; and
6. That the retaliation against the employee was motivated, at least in part, by the employee's engaging in protected activity.

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed. 2d 207 (1981); *Dean Dartey v. Zack Company of Chicago*, 82-ERA-2, final Decision and Order of the Secretary issued April 25, 1983, slip op. at 6-9. Once the Complainants have established a *prima facie* case, the burden of production then shifts to the Employer to show that the discharge or other adverse action would have occurred in any event regardless of the forbidden motivation. If the Employer satisfies this intermediate proof burden, then the burden shifts back to the employee to establish that the proferred legitimate business reasons for the termination were merely pretextual in explaining the discharge. Although both parties bear proof burdens under this standard, the burden of proving by a preponderance of all of the evidence that retaliation for protected activities was a motivating factor in the employee's action always remains with the Complainant and never shifts to

---

the Employer. *Dean Dartey v. Zack Company of Chicago, supra*.

Wright Line makes it clear that the employee must prove the Employer's guilt by a preponderance of the evidence. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 87 S.Ct. 1792 (1967). The opinion by the Circuit Court in *Wright Line* explained that the only burden which could acceptably be placed upon the Employer is a "burden of production" which was described as a responsibility of going forward with credible evidence to rebut or meet the *prima facie* case. That responsibility has been characterized as an obligation upon the Employer to "come forward with enough evidence to convince the trier-of-fact that, under the circumstances, there is no longer a preponderance of evidence establishing a violation." *NLRB v. Amber Delivery Service*, 651 F.2d 57 (1st Cir. 1981). The Court, in *Wright Line*, concluded that the "burden" referred to in making reference to the Employer's obligations is merely a burden of going forward to meet the *prima facie* case, not a burden of persuasion on the ultimate issue of the existence of a violation.

The record clearly shows that Fluor Constructors, Inc., was the Employer of Floyd M. Simmons and Larry D. Simmons. Therefore, the party charged with discrimination is an employer subject to the Act, and the Complainants are employees under the Act.

The record also shows that Fluor Constructors, Inc., laid off the Complainants on March 30, 1988. Layoffs have been construed to constitute unlawful discrimination. *NLRB v. News Syndicate Co.*, 279 F.2d 323 (2d Cir. 1960), *aff'd* 365 U.S. 695 (1961). Under these whistleblower laws, unlawful discrimination is given an inclusive definition. *DeFord v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983); *Ellis Fischel State Cancer*

Hospital v. Marshall, 629 F.2d 563 (8th Cir. 1980). I, therefore, conclude that the layoff of the Simmons brothers is considered to be a discharge or other discriminatory act within the meaning of these Regulations. Complainants also argue that the failure of Fluor to rehire them for short-term employment immediately prior to the hearing in this case constituted a black listing which also can be construed to be unlawful discriminatory conduct under these Regulations. The Respondent, on the other hand, argues that the administrative processes required to bring that issue before this tribunal were not followed and, therefore, I have no jurisdiction to consider that action other than as merely circumstantial evidence for purposes of reviewing all of the

---

evidence in this case in determining un lawful conduct. I agree with the Respondent in that regard.

Complainants must next prove that they engaged in protected activity. The record is clear that on March 16, 1988, which was approximately two weeks before the date of their layoff, the Complainants advised Fluor's management that they would carry the question of respirator use to the Nuclear Regulatory Commission. The statute involved here protects employees who actually commence or are "about to commence" a proceeding under this chapter. Respondents argue that the clear inference of the weight of all of the evidence in the record supports a finding that the Complainants only went to the NRC because they had been laid off. I disagree with that conclusion. Based upon the past history of the Simmonses with respect to filing complaints, I believe they would have carried the matter to the NRC if it had not been resolved internally regardless of their subsequent layoff.

Complainants also contend that the record shows other protected activity in addition to their threats to carry the respirator issue to the NRC. They allege that their refusal to work in the decay heat pit, unless provided respiratory protection, is also protected under the ERA. *Pensyl v. Catalytic, Inc*., 83 ERA 2, Opinion of the Secretary, January 13, 1984. The standard set down by *Pensyl* for determining whether a refusal to work is a protected activity is as follows:

> A worker has a right to refuse to work when he has a good faith, reasonable belief that working conditions are unsafe or unheathful. Whether the belief is reasonable depends on the knowledge available to a reasonable man and the circumstances with the employee's training and experience.

The record shows here that the Complainants had seventeen years of experience at the Crystal River Plant. Both Florida Power Fluor appeared to have been very safety conscious in that regular safety meetings were conducted by the companies. Larry Simmons experienced a radioactive spot contamination to his shoulder from a floor particle while working in a decay heat pit just two days prior to the time that Florida Power refused to continue respirator protection for the Complainants. Based upon the

type of work which they were performing in the decay heat pit as demonstrated on the video received into evidence, I believe that

---

[Page 22]

there would have been concern that if the floor of the pit had contained radioactive contamination, that it could have been stirred up into the air during their work. Therefore, I believe that the Complainants did have a good faith, reasonable belief that working conditions were unsafe or unhealthful. This record does not disclose that the health physics unit of Florida Power ever fully investigated the contentions made by the Simmonses in regard to this unhealthful working condition. Even though industrial respirators were subsequently provided by Florida Power, I do not believe that that resolution of the issue caused the Simmons' refusal to work to lose its protected status.

In addition to the above two episodes, Complainants also contend that there exist other protected activity in which they were engaged immediately prior to their discharge. Since protected activity has been found in two instances already, I see no reason to explore these other conditions in any detail. Suffice it to say that the Complainants have established that they were engaged in protected activity.

George S. Renshaw testified that he learned on March 16, 1988, that the Complainants had threatened to carry the respirator issue to the NRC. He had subsequent discussions of that problem with other management personnel. He also was aware that the Simmonses had refused to work in the decay pits until respirators were provided, and thus, was also aware of that protected activity. Thus, the Complainants have established that the Employer had knowledge that the employees had engaged in at least two protected activities. The other protected activities being alleged by the Complainants in my judgment are subject to doubt. However, in viewing this case in its entirety, the question of the protected nature of those activities by the Complainants becomes academic.

Finally, it was incumbent upon the Complainants to establish that the retaliation against them was motivated, at least in part, by the employees engaging in the protected activity. In establishing discriminatory motive against the employee, either direct or circumstantial evidence can be used. Ordinarily, subtle discrimination is present which requires the employee to demonstrate a variety of circumstances giving rise to a reasonable inference of the discriminator motive of the employer. The courts have concluded that:

[Page 23]

> The presence or absence of retaliatory motive is a legal conclusion and is provable by circumstantial evidence even if there is testimony to the contrary by witnesses who perceived lack of such improper motive.

Ellis Fischel State Cancer Hospital v. Marshall, supra.

Based upon the following indicia, I conclude that the Complainants have established a discriminatory motive for their layoff.

The record is clear that in terms of welding ability, the Simmonses were the best qualified welders at the Crystal River plant. In fact, Mr. Renshaw acknowledged that fact. In addition to their welding capabilities, they also had seventeen years' experience at the Crystal River facility. That experience was gained through employment with several different companies, and their longevity is further evidence of the quality of their work. The criteria of excellence in welding, experience with the Crystal River facility, and longevity are evidence of their employment contribution over the years.

The manner in which the Complainants were laid off is also evidence of discrimination. There had been no advance notice of the impending layoff. Upon their departure, the Complainants were not apprised of any possibility of returning to Crystal River. There is evidence that previously, the company had been very cooperative and reassuring about rehiring the core employees. That was not done here. In fact, the Complainants indicated that they did not even put their tools away on the morning that they were notified that they had been terminated. They had but four hours to leave the premises.

The record shows that the Simmonses taught Jerry Salter how to weld. Salter was one of the individuals retained when the Simmonses were laid off. The record shows that on at least one occasion, Salter had to be pulled off of a job because of his welding inexperience, and the record is also clear that Richard Denmark was not as qualified as the Simmonses in terms of welding experience. Jerry Salter was not certified to inspect snubbers, and he had been given a special dispensation with regard to testing at the plant because of a problem with dyslexia. The retention of Salter would seem to indicate that a welder of less ability had been retained to the detriment of the Complainants.

[Page 24]

On March 30, 1988, which was the date of the layoff, there seemed to be some rush involved to get the Complainants off of the job site within four hours. They had testified that on other occasions, other individuals had been permitted to work the rest of the day. The record also shows that Martin C. Brown, a mechanical supervisor, had threatened the Complainants with layoff and similarly, a Florida Power supervisor had done the same thing. Mr. Brown apparently did not retain a congenial attitude toward Mitchell Simmons after the incident in July of 1987, and be did not speak to Mitchell Simmons following the sea water incident in October of 1987. In fact, there appeared to be some hostility that existed subsequent to that date. Additionally, the record discloses a history of complaint filing by Mitchell Simmons with both OSHA and the NRC. Martin C. Brown was there during the term of these filings, and therefore, Fluor management also had knowledge of the prior filing history of the Complainants. The record also shows that the same Mr. Brown requested the verbal testing of Jerry Salter as to the welding techniques and that action can be interpreted as demonstrating preference. Of the eight pipefitters that remained on the date of the layoff, the Complainants held the highest welding

certifications. Half of the pipefitters who remained held some welding certifications, but they were not as great in terms of numbers as the Simmonses. The record also shows that in the areas in which the Simmonses had voiced complaints, that the company had generally capitulated to the demands of the Simmonses. For instance, in the use of the respirators in the decay pits, in the installation of the retrofit testing equipment, and also in the sea water room incident, the company apparently capitulated. This activity could have caused resentment among the Fluor managers. Additionally, when the Complainants were assigned to the scrap yard to cut up scrap, no explanation had been provided to them as to why that action was being taken. They had been under the impression that their work was to continue in decay pit A until its completion. Clearly in this case, the layoff of the Complainants took place approximately two weeks following the respirator incident in decay pit B. There is also evidence that two other pipefitters had been reemployed the Friday before the commencement of this hearing, and those individuals had welding qualifications which were inferior to the Complainants here.

Based upon all of these factors, I conclude that these Complainants have established that the retaliation against them

---

was motivated at least in part by the employees engaging in protected activity, and that some element of discriminatory motive has been established.

In view of the above findings, the Complainants have now established a *prima facie* case of discrimination under this whistleblower statute.

Since the Complainants have established a *prima facie* case, the burden of production now shifts to the Employer to show that the layoff action would have occurred regardless of any forbidden motivation. It is now incumbent upon the Employer to move forward with credible evidence to rebut or to meet the *prima facie* case. Following an evaluation of the Employer's evidence, I conclude that the Employer has established, under the circumstances of this case, that there is no longer a preponderance of evidence establishing a violation. That conclusion is based upon the following findings.

First and foremost is the fact that the numerical statistics relied upon by Fluor support their contentions for the layoff. The record shows that drastic manpower reductions were taking place following Refuel VI in that Fluor employees had been reduced from four-hundred eighty-six to forty-six as of the time of the Complainants' layoff. During this refueling, there was a high of one-hundred fourteen pipefitters and a low of seven as of January 12, 1988. Clearly, the record establishes decreasing manpower needs. Of the pipefitters retained, there was evidence that some of them were scheduled off because there was no work to do during the months of April, June, and July 1988. (RX L) During the same week of March 29, 1988, that the Complainants were laid off, there also were eight other craft workers who were also laid off. The following week, four more craft workers were let go, and the week after that, three more. (RX A) These employment

statistics clearly support a finding of continued reductions in force as of the time that the Complainants were laid off.

The testimony of George S. Renshaw, who was the Project Site Manager, is also compelling. Mr. Renshaw testified that he and Jim Patterson, the Project Superintendent, had decided as early as January 1988, that the Simmonses would be the next two core employees to be laid off. That decision was apparently made approximately one and one-half months before the actual layoff

---

[Page 26]

occurred. The record shows that Renshaw was requested to lay off the Simmonses in January of 1988, but he decided against that action because of the nature of the workload. Mr. Renshaw's testimony in this regard stands unrebutted in this record. I observed Mr. Renshaw to be an entirely credible witness, whose credentials are impeccable for the position that he holds.

Renshaw also testified concerning the change in philosophy experienced by Florida Power in January of 1988 concerning the maintenance work to be allocated to Fluor. Renshaw testified that he had been apprised by Clinton Dutcher, who was Florida Power's mediary, that Fluor would not get as much maintenance work under future contracts as they had in the past. The dollar amounts associated with these contracts evidence smaller maintenance allotments by Florida Power. Obviously, any reduction in work volume by Fluor would have a negative impact upon total employee numbers. Renshaw testified that this development was a primary consideration in determining which pipefitters were let go on March 30, 1988. His testimony was that he looked for individuals who had leadership capability and who would be able to take charge of new employees during the next outage. During the tenure of the Simmonses at Fluor, they had not been used as foremen. Renshaw also indicated that he was required to weigh the overall general skills of the employees in addition to anticipating future demands. Since the Simmonses were basically welders, and he did not anticipate significant welding activity under the new contract, he concluded that the Simmonses should be laid off. Mr. Renshaw referred to the scrap heap work at the end of the employment week of the Simmonses on March 30, 1988, as supporting his contention in that regard. The Simmonses were working on the scrap heap because there was no other technical welding work for them to do. He characterized the scrap heap work as basically make work. On March 29, 1988, Florida Power advised Fluor that the work on the decay pit A would not be rolled over to the new contract, and probably would not be done at all until 1989. Renshaw had hoped that that work would have been rolled over into the new contract, but it was not and, therefore, the layoff of the Simmonses became imminent. The record also shows that in addition to the Simmonses, six other craft workers were laid off about March 30, 1988, of which four were electricians.

Renshaw testified that as far as he could see, the remaining work and the work which would exist in the immediate future, was

[Page 27]

not for someone who was primarily a welder which was the case with the Simmonses.

By way of explanation, Renshaw also testified that it was Clinton Dutcher who had advised him that Florida Power would only compensate the Simmonses for four hours in the morning of March 30, 1988, and, therefore, they only had four hours to remove themselves from the premises. Therefore, Renshaw was not the one who made that decision. Concerning the two recent pipefitter hirees, Renshaw testified that the work involved was primarily mechanical and not welding and, therefore, the Simmonses were not hired. In meeting the other contentions made by the Complainants, Renshaw testified that the problems with the dosimetry readings were computer-related, and that he had not even been aware of those problems until after the Simmonses had been laid off. When the air bottle incident had taken place, he was not even employed by Fluor, and besides, since it was safety-related, it was the responsibility of Florida Power. Concerning the crane incident and the fire watch problem, his testimony was that he was not aware of those activities until after the Simmonses had been laid off. Additionally, the quality control covering the washing of welds in the sea water room was under the control of Florida Power also.

Finally, Mr. Renshaw testified unequivocally that the complaints filed by the Simmonses were not involved in anyway in their having been laid off. Counsel for the Complainants strongly attack the welding credentials of the pipefitters who were retained. However, based upon the explanation provided by Mr. Renshaw, I believe his testimony that it was a management decision based upon business necessity.

For each and all of these reasons, I conclude that Fluor Constructors has demonstrated a legitimate non-discriminatory reason for the layoff of the Complainants. Fluor has demonstrated that the layoff of the Simmonses would have occurred in any event, regardless of any forbidden motivation.

Since the Employer has now established that there is no longer a preponderance of evidence establishing a violation, it is now incumbent upon the employees to produce evidence of "disparate treatment." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Wright Line, supra*; *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977). Disparate treatment

[Page 28]

simply means that an employee who engages in protected activity was treated differently, or disciplined more harshly, than an employee who did not engage in the protected activity. *Donovan o.b.o Chacon v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983). I find no evidence in this record that disparate treatment was afforded any employee. The Simmons' position with Fluor seems to have been unique in that they were clearly

outstanding welders, but the company's need for welding services had diminished over the years. Complainants have sought to argue that comparability existed between the Simmonses and Jerry Salter, and that preferential treatment at least was given to Mr. Salter since he was retained. However, that argument was refuted for the reasons indicated by Mr. Renshaw as to why he retained Mr. Salter over the Simmonses at the time that the Simmonses were laid off. Complainants have not argued that the Simmonses were treated any differently or disciplined more harshly than any of the other employees who were retained by Fluor at the time that the Simmonses were laid off at the end of March in 1988. In my judgment, the disposition of this case boils down to a simple question of business necessity. Fluor's work diminished, and therefore, the employee rolls had to be reduced. As a part of that reduction process, the need for expert welders was reduced, and therefore, the Simmons were separated. I find no evidence of disparate treatment in this record.

CONCLUSION

For each and all of the reasons mentioned above, and in considering the record as a whole, I find and conclude that the Complainants were not laid off on March 30, 1988, because of any activities protected by the Act; accordingly, no violation of the statute has been demonstrated, and the complaint is not entitled to a remedy.

ATTORNEY'S FEES

Since the Complainants have not prevailed in this proceeding, no attorney's fees or costs are assessed against the Respondent.

ORDER

It is recommended that the complaints filed in this matter by Floyd M. Simmons and Larry D. Simmons be dismissed.

RUDOLF L. JANSEN
Administrative Law Judge

[ENDNOTES]

[1] In this Recommended Decision, "CX" refers to Complainant's Exhibits, "RX" refers to Respondent's Exhibits, and "Tr" refers to the Transcript of the hearing.

[2] ALARA is basically a safety group and the initials stand for "As Low As Reasonably Achievable."

[3] He is primarily known by the name of Mitchell Simmons.